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Recent Illinois Decisions

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DAMAGES — PLEADING, EVIDENCE, AND ASSESSMENT — WHETHER, IN PERSONAL INJURY SUIT, JURY IS ENTITLED TO LEARN OF INCIDENCE OF TAXATION FOR PURPOSE OF FIXING MEASURE OF RECOVERY—In the recent personal injury suit entitled *Hall* v. *Chicago & North Western Railway Company,*[1] counsel for the defendant, in a closing argument, mentioned to the jury that, in the event the verdict was for the plaintiff, the amount recovered by plaintiff would not be subject to deduction for federal income tax. Objection to this remark was sustained and the trial court, being of the opinion that the statement had resulted in prejudice to the plaintiff, ordered that a new trial should be had. Defendant appealed from this order to the Appellate Court for the First District and that court concluded that, as the remarks made were proper, the trial court order had to be reversed and the case remanded with direction to reinstate the verdict. The plaintiff thereafter carried the case to the Illinois Supreme Court and there succeeded in having the Appellate Court decision reversed and the original order for new trial reinstated.

The Illinois Supreme Court justified its agreement with the trial court view on the ground that the weight of authority on the point of fixing the measure of damage for loss of earning capacity was to the effect that gross earnings alone should be considered and that net income ought not be figured in arriving at a computation as to the amount of damage suffered by a plaintiff.[2] In that connection, the court noted that a plaintiff is not permitted to comment on the fact that such items as the fees of medical witnesses, the cost of taking depositions, the charges of court reporters, and the expense of attorney's services are paid for by the plaintiff out of his recovery. It being a matter of general principle that, in the trial of a lawsuit, the status of the parties is immaterial, so "what the plaintiff does with the award is . . . of no concern to the court or jury," it followed that

[1] 5 Ill. (2d) 135, 125 N. E. (2d) 77 (1955), reversing 349 Ill. App. 175, 110 N. E. (2d) 654 (1953). Compare the holding therein with the one attained in Maus v. New York, Chicago & St. Louis Railroad Co., — Ohio App. —, 128 N. E. (2d) 166 (1955).

[2] In an annotation appearing in 9 A. L. R. (2d) 320, it is suggested that where the question has arisen, in reported cases, "the courts generally have been of the opinion that in fixing damages for impairment of earning capacity the fact that the damage award will be exempt from income tax, whereas if the awardee had not sustained the loss of earning capacity and had gone to work and received the income forming the basis of such damage award, he would have become subject to income tax liability on such earnings, is not a matter to be taken into consideration and is no ground for diminishing the amount of damages for impairment of earning capacity." See also Chicago & North Western Railway Co. v. Curl, 178 F. (2d) 497 (1949).

whether or not the plaintiff paid a tax was a matter of concern only to the plaintiff and the government and, if remarks of the kind in question were allowed, the congressional intent "to give an injured party a tax benefit" would be nullified.[3]

In the only other case to date where the precise question has arisen, that of *Dempsey* v. *Thompson*,[4] the Supreme Court of Missouri, on the other hand, came to the conclusion that the fact that an award would not be subject to income tax was a proper matter for the jury to consider in determining the measure of damage. In that case, the court said: "Present economic conditions are such that most citizens, most jurors are not only conscious of, but acutely sensitive to, the impact of income taxes . . . Few persons, other than those who had had special occasion to learn otherwise, have had any knowledge of the exemption involved in this case. It is reasonable to assume the average juror would believe the award involved in this case to be subject to such taxes . . . Surely, the plaintiff has no right to receive an enhanced award due to a possible and, we think, probable misconception on the part of a jury that the amount allowed by it will be reduced by income taxes."[5]

As neither of the supreme courts concerned have made any attempt to explain away the arguments on the side opposite to their respective conclusions and as the matter is of relatively unique character, it will be interesting to see what other states may decide when the issue again comes up for consideration. The impact of taxation being what it is, it is certain that the question will not be left to rest on these two adverse holdings.

HUSBAND AND WIFE—ACTIONS—WHETHER LEGISLATIVE PROHIBITION AGAINST SUITS BETWEEN SPOUSES BASED ON TORTS COMMITTED DURING COVERTURE POSSESSES RETROACTIVE EFFECT—Of minor but possibly noteworthy significance is the determination recently achieved by the Appellate Court for the Fourth District in the case of *Hindman* v. *Holmes*.[1] In that case, a married woman sued her husband and another charging acts of wilful and wanton misconduct to the defendants which had caused her to suffer personal injury. The husband, by way of answer, pleaded the terms of an appropriate Illinois statute[2] as a bar to the suit, relying on the proposition that the acts complained of had occurred during coverture, and thereafter moved for judgment on the pleadings. The motion for

3 5 Ill. (2d) 135 at 151-2, 125 N. E. (2d) 77 at 86.

4 363 Mo. 339, 251 S. W. (2d) 42 (1952), reversing 360 Mo. 177, 227 S. W. (2d) 675 (1948).

5 363 Mo. 339 at 346, 251 S. W. (2d) 42 at 45.

1 4 Ill. App. (2d) 279, 124 N. E. (2d) 344 (1955).

2 Laws 1953, p. 437; Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 1.

judgment in favor of the husband having been granted, the plaintiff appealed on the ground the statute in question, which was passed after her suit had been instituted, ought not be given retroactive effect but the Appellate Court held to the contrary and affirmed the judgment dismissing the suit.[3]

There can be no question over the point of the right of a spouse to sue the other spouse on the basis of an intermarital tort occurring between them for, despite the holding of the Illinois Supreme Court in the case of *Brandt* v. *Keller*[4] purporting to sanction litigation of that character, the legislature subsequently acted to prohibit such suits.[5] Clearly, then, the institution of new suits of this type would not be permitted at this time. It is possible, however, as in the instant case, that a number of actions may have been commenced in the brief hiatus between the holding in the Brandt case and the subsequent legislative declaration on the point, and many of these suits might remain pending, awaiting trial. If so, it would seem, on the basis of the instant decision, that all such suits should be dismissed inasmuch as the court there construed the word "sue," as found in the amended statute, to cover not only the institution of an action but also the bringing of the same to a conclusion. To the extent that any suits of this character remain undetermined, therefore, they would seem to fall within the scope of the legislative prohibition as so interpreted.

JURY—RIGHT TO TRIAL BY JURY—WHETHER ACCUSED POSSESSES AN UNQUALIFIED RIGHT TO WAIVE TRIAL BY JURY IN CRIMINAL CASES—Resolution of a doubtful issue concerning trial by jury in criminal cases has been provided by the holding of the Illinois Supreme Court in the recent case of *People* v. *Spegal*.[1] The defendant therein had been charged with the heinous crime of murder. Prior to trial, the defendant moved to waive trial by jury and the prosecution indicated that it had no objection to such waiver but the trial judge, nevertheless, forced defendant to stand trial before a jury. He was found guilty under a verdict which fixed the punishment at death.[2] Following disposition of motions for new trial and

[3] As the lower court order did not operate to dispose of the action so far as it related to the other defendant, the court expressed no opinion concerning the liability of that individual. On the point of the right of a wife to hold a principal liable for a tort committed by a husband-agent, see Tallios v. Tallios, 345 Ill. App. 387, 103 N. E. (2d) 507 (1952), and note in 30 CHICAGO-KENT LAW REVIEW 343-9.

[4] 413 Ill. 503, 109 N. E. (2d) 729 (1953).

[5] Laws 1953, p. 437, Ill. Rev. Stat. 1953, Vol. 1, Ch. 68, § 1, which authorizes a married woman to sue and be sued, now declares that "neither husband nor wife may sue the other for a tort to the person committed during coverture."

[1] 5 Ill. (2d) 211, 125 N. E. (2d) 468 (1955).

[2] Under Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 360, the jury, if one is used, is required to fix the punishment for murder.

in arrest of judgment,[3] the defendant was sentenced in conformity with the verdict but, on writ of error to the Supreme Court, the conviction was reversed and the cause was remanded for a new trial when the higher court decided it was error to deny to the defendant an untrammelled right, if he so wished, to waive trial before a jury.

It had, at one time, been the considered law in Illinois that a constitutional tribunal for the trial of a criminal case consisted of a combination of judge and jury, with other officers, no part of which could be waived by the litigants unless the defendant pleaded guilty, in which case no trial was necessary.[4] This view was forced, by the pressure of events, to yield to the concept that a defendant charged with a criminal offense could waive jury trial[5] but an irrational limitation was later placed around the waiver privilege, under the holding in *People* v. *Scornavache,*[6] when the then Supreme Court, divided four to three, said that, to be effective, the waiver had to be concurred in by the prosecution.[7] Legislative attempts to destroy this limitation[8] were held, in *People* v. *Scott,*[9] to amount to an unconstitutional interference with the judicial power vested in the judicial department of the state government,[10] and it was on this basis that the trial judge concerned in the instant case justified his refusal to accept the proferred waiver.

The holding in the case at hand, rejecting and overruling views expressed in the *Scornvache* and *Scott* cases, not only sounds a welcome note as it serves to place the privilege of trial by jury in criminal cases completely in the hands, and under the control, of those to whom it rightfully belongs[11] but also operates to save other statutes, such as the one pertaining to the regulation of trial by jury in civil cases,[12] from a similar claim of unconstitutionality.

3 The defendant urged, in support thereof, not only the trial court ruling aforementioned but an additional ruling, made after pleading not guilty, denying a renewal of his motion to waive trial by jury to which the prosecution had offered no objection.

4 See Harris v. People, 128 Ill. 585, 21 N. E. 563 (1889).

5 People ex rel. Swanson v. Fisher, 340 Ill. 250, 172 N. E. 722 (1930).

6 347 Ill. 403, 179 N. E. 909, 79 A. L. R. 553 (1932).

7 This limitation was classed as being an "unsound requirement" in Zacharias, "Waiver of Jury in Criminal Cases," 22 CHICAGO-KENT LAW REVIEW 138-45 (1944), particularly p. 143, note 48.

8 Laws 1941, Vol. 1, p. 574; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 736.

9 383 Ill. 122, 48 N. E. (2d) 530 (1943).

10 See Ill. Const. 1870, Art. III, and Art. VI, § 1.

11 Ill. Const. 1870, Art. II, § 9, expressly states: "In all criminal proceedings *the accused* shall have the right to . . . a speedy public trial by an impartial jury. . . ." Italics added.

12 See, for example, Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 188(1), which was held constitutional in Stephens v. Kasten, 383 Ill. 127, 48 N. E. (2d) 508 (1943).

JURY—RIGHT TO TRIAL BY JURY—WHETHER PLAINTIFF IS ENTITLED TO DEMAND TRIAL BY JURY WHERE DEFENDANT, ON COUNTERCLAIM, FIRST ASSERTS AND THEN WAIVES RIGHT TO JURY TRIAL—Still another question concerning the right to trial by jury in civil cases came before the Appellate Court for the First District when that court was recently asked, in the case of *Schwartz* v. *Lake View Tool & Manufacturing Company*,[1] to decide whether a trial court would have authority to permit a plaintiff to demand a jury trial, when a defendant waived a prior jury demand made by it, under circumstances where the plaintiff had filed no jury demand whatever until after the defendant had acted to waive the request filed by it. The case was one in which the plaintiff had filed an action in contract in the Municipal Court of Chicago. At that time, plaintiff had not asserted any right to a jury trial. Defendant entered an appearance, filed an answer and counterclaim, and demanded a jury trial.[2] Plaintiff answered the counterclaim but did not join in the jury demand of the defendant. When the case was called for trial nearly three years later, defendant waived its earlier demand for jury trial. At that time, plaintiff insisted on a jury trial and, the trial court having allowed plaintiff's motion over objection, the jury returned a verdict for plaintiff on the claim and against defendant on its counterclaim. On appeal, this holding was reversed, and the cause remanded for a new trial, on the ground it was error to grant plaintiff's late request for jury trial.

In support of this holding, the Appellate Court pointed out that Section 30 of the Municipal Court Act,[3] as supplemented by Rule 59 of the Municipal Court of Chicago,[4] clearly sets forth the two opportunities afforded to a plaintiff to file a demand for jury trial, *i. e.*, first, at the time he commences his action, and second, at the time he files a defense, or takes other action with respect, to a counterclaim by the defendant, if a counterclaim is presented. If not then asserted, the right to trial by jury is deemed waived and the plaintiff has forever lost his right to renew it. The dominant consideration being a definite time for the making of the demand, rather than a change in the circumstances of the parties, any discretionary power in the trial court to extend the time for the filing of a jury demand, provided good cause was shown, was clearly not available to aid a plaintiff who had waited nearly three years to make his request.

[1] 4 Ill. App. (2d) 565, 124 N. E. (2d) 570 (1955).

[2] This demand would necessarily apply to both the original cause and the counterclaim as the issues under both would normally be tried at the same time.

[3] Ill. Rev. Stat. 1953, Vol. 1, Ch. 37, § 385. The text thereof is similar to ibid., Vol. 2, Ch. 110, § 188, so the holding in the instant case, while strictly applicable only to the Municipal Court of Chicago, would seem to be precedent as to cases in the state courts.

[4] See Rules, Municipal Court of Chicago (1940).

The fact that the defendant had first demanded and then waived a jury trial was said not to be a sufficient showing of good cause on the part of plaintiff as to warrant an exercise of discretion in his behalf.[5]

While no previous case involving a similar factual situation seems to have arisen in Illinois, the holding of the Appellate Court might well have been foreseen in view of prior rulings on related points. It has been said, for example, that a defendant loses the right to a jury trial if the same is not asserted at the time of his appearance, unless an acceptable excuse is offered to explain away the omission,[6] and that the time for filing the demand is not enlarged by the grant of additional time in which to plead.[7] In addition, the right may not be asserted, if originally waived, in the event the case is remanded, following appeal, for a new trial.[8] It would appear, then, that a plaintiff who is named as a party to a counterclaim would be vigilant enough to present a jury demand with his answer thereto if he wishes to assure himself of a jury trial as to the issues formed on the counterclaim, even though he may have been willing to submit his original case for trial by the court, and should not be lulled to rest by any demand made by his opponent. If this smacks too much of the possibility for ambush, the remedy would appear to lie in the making of some suitable revision in the statute for it is, at present, silent on the particular point.

WITNESSES—COMPETENCY—WHETHER WIFE OF ACCUSED IS COMPETENT TO TESTIFY AGAINST HER HUSBAND CONCERNING NON-PRIVILEGED COMMUNICATIONS BETWEEN THEM—An interesting question of evidence law was recently presented to the Illinois Supreme Court in the case of *People* v. *Palumbo*.[1] The defendant there had been indicted and placed on trial for an illegal sale of narcotics. One witness had testified that, as the buyer, he came to the defendant's home carrying marked bills supplied by the police and had been handed a package of narcotics by defendant's wife in the presence of the defendant. The prosecution then called the defendant's wife as a corroborating witness and she testified, over objection as to her competency, to a conversation between herself and her husband, in the buyer's presence, which tended to substantiate the state's

5 Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 188, recognizing the possibility that a defendant may be misled to his detriment by the presence of plaintiff's request for a jury trial, permits the defendant to first assert the right, on payment of all proper fees, within a specified period of time after notice of the plaintiff's subsequent waiver of trial by jury.

6 Stephens v. Kasten, 383 Ill. 127, 48 N. E. (2d) 508 (1943).

7 Vail, Mills & Armstrong v. City of Paris, 344 Ill. App. 590, 101 N. E. (2d) 861 (1951). But see Roszell v. Gniadek, 348 Ill. App. 341, 109 N. E. (2d) 222 (1952).

8 Reese v. Laymon, 2 Ill. (2d) 614, 119 N. E. (2d) 271 (1954), noted in 32 CHICAGO-KENT LAW REVIEW 345.

1 5 Ill. (2d) 409, 125 N. E. (2d) 518 (1955).

case. Following his conviction, the defendant brought the case before the Illinois Supreme Court on writ of error but that court, upholding the trial court ruling on the objection, affirmed the conviction.

Prior to the determination of the instant case, the Illinois Supreme Court had refused to recognize the competency of a wife to testify either for or against her husband in a criminal case but, in *People* v. *Kendall*,[2] the court did recognize the possibility that the legislature, which had made some changes in the common law rules on the subject, might make further changes from time to time. At about the time of that holding, the Supreme Court of the United States decided, in *Funk* v. *United States*,[3] that, in line with a trend on the part of courts and legislative bodies to remove testimonial disabilities, the wife of a defendant in a federal criminal case was competent to be a witness in her husband's behalf. A further step in the same direction was taken in the case of *Wolfle* v. *United States*[4] when the federal supreme court said that "Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged; but wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication."[5]

Following thereon, the Illinois legislature amended certain portions of the Evidence Act[6] as well as certain portions of the Criminal Code[7] so as to make husbands and wives competent to testify for or against each other, but did provide that neither might testify as to communications or admissions made by one to the other or as to conversations between them during coverture. Construing these provisions in the instant case, the Illinois Supreme Court reached the result that it was the intention of the legislature to eliminate the general common-law testimonial disqualification adhering to husbands and wives and to retain only the common-law privilege as it related to confidential communications, a privilege based upon a desire to preserve the matrimonial relationship by drawing a cloak of protection around marital confidences. As the communication in the instant case between the husband and the wife had been made in the presence of a third party, it was not considered confidential, hence was unworthy of judicial protection. When the case is read in the light of the modern policy on the subject of the competency of witnesses, it can only be said that the result obtained is an eminently sound one.

[2] 357 Ill. 448, 192 N. E. 378 (1934).
[3] 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369 (1933).
[4] 291 U. S. 7, 54 S. Ct. 280, 78 L. Ed. 617 (1933).
[5] 291 U. S. 7 at 14, 54 S. Ct. 280, 78 L. Ed. 617 at 620.
[6] Laws 1935, p. 869; Ill. Rev. Stat. 1953, Vol. 1, Ch. 51, § 5.
[7] Laws 1937, p. 502; Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 734.